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IN THE

Supreme Court of the United States

October Term, 1984

INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., THE CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
Petitioners,

vs.

MARINE MIDLAND BANK, N.A.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Introduction

Respondent, Marine Midland Bank, N.A. ("Marine"),[1] submits this brief in opposition to the petition for a writ of certiorari ("Pet.") filed by the Independent Bankers Association of New York State, Inc. and The Canandaigua National Bank and Trust Company ("CNB").

Statement Of The Case

A. Facts.

In 1983 Wegmans Food Markets, Inc. ("Wegmans") purchased and installed automated teller machines ("ATMs") bearing the name "Wegmans Electronic Teller" in 31 of its grocery stores in upstate New York. Wegmans subsequently entered into agreements with the operators of two ATM networks, HarMoney and Metroteller. HarMoney and Metroteller are both "shared" networks—that is, financial institutions belonging to the networks may authorize their customers to initiate transactions in their accounts through other network members' ATMs. Marine is a member of the HarMoney network and is also the owner of the network's computer switching system or "Switch."

Wegmans' agreements with HarMoney and Metroteller permit financial institutions belonging to the two networks to authorize their customers to use Wegmans Electronic Tellers. The financial institutions that have

[1] Marine, a national bank having its principal office in Buffalo, New York, is a wholly-owned subsidiary of Marine Midland Banks, Inc. ("MMBI"). The common stock of MMBI is 51% owned by a subsidiary of The Hongkong and Shanghai Banking Corporation. Marine has no subsidiaries except wholly-owned subsidiaries. MMBI has the following subsidiaries (other than wholly-owned subsidiaries): Chronogram Corporation, CM&M Asset Management Company, Inc., Wardley Marine International Investment Management Ltd. and International Treasury Management, Ltd.

allowed their customers to use Wegmans' ATMs include Marine and other national banks, state banks and savings banks, and federally-chartered savings and loan associations and credit unions. Wegmans expects additional networks and financial institutions to arrange to use its ATMs in the future.

A customer of Marine or another HarMoney network member wishing to obtain cash from a Wegmans Electronic Teller inserts an encoded plastic card furnished by his financial institution into the ATM and enters his personal identification number and the requested transaction and amount on the ATM keyboard. This information is transmitted through the Switch, which sends back an approval or rejection message based on criteria established by the customer's financial institution. Assuming approval, the ATM dispenses cash previously loaded in the machine by Wegmans and issues a "Wegmans Electronic Teller" receipt. The Switch generates a credit in the amount dispensed to a HarMoney network settlement account maintained by Wegmans; a corresponding debit is made to the financial institution's settlement account. The financial institution debits its customer's account in accordance with its own procedures.

A customer wishing to initiate a deposit at a Wegmans Electronic Teller inserts his card, enters his number and the requested transaction data, and drops a Wegmans Electronic Teller Deposit/Payment Envelope into the ATM's deposit slot, from which it falls into a secured deposit transaction container. The ATM issues a receipt, and the Switch generates corresponding debits and credits to the respective settlement accounts. Wegmans removes the container at the end of each day and delivers it unopened to a designated branch bank depository. The financial institution credits its customer's account in accordance with its own procedures.

Wegmans' decision to develop its ATM system was made independently and preceded any contact with HarMoney or Marine. Wegmans is exclusively responsible for the purchase, location, maintenance and operation of its ATMs, including loading the machines with cash and removing and transmitting the secured transaction containers for deposit. Wegmans' purpose in developing its ATM system was to attract customers to its stores and to support a high-volume grocery business. In addition to these benefits, Wegmans receives a transaction fee each time a customer of a HarMoney member financial institution uses one of its ATMs; this fee represents a portion of the fee the financial institution pays to the HarMoney Network for the transaction.

B. Status Of Wegmans Electronic Tellers Prior To Petitioners' Suit.

At the time Wegmans established its ATMs and connected them to the HarMoney network, such facilities were not considered, for purposes of the National Bank Act, "branches" "established and operated" by national banks that authorized their customers to use them.[2] This conclusion was based on a 1976 ruling of the Comptroller of the Currency ("the Comptroller"), 41 Fed. Reg. 4833 (1976), issued following the District of Columbia Circuit's decision in *Independent Bankers Ass'n of America v. Smith* ["*IBAA v. Smith*"], 534 F.2d 921 (D.C. Cir. 1976), *cert. denied sub nom., Bloom v. Independent Bankers Ass'n of America*, 429 U.S. 862 (1976), and adopted as a final regulation in July, 1982, 12 C.F.R. §5.31. The Comptroller's regulation (set forth at Pet. 3a) provides

[2] The relevant provisions of the National Bank Act are 12 U.S.C. §§36(c) and (f), commonly referred to as the McFadden Act, which are set forth at Pet. 1a.

that an automated device that takes deposits or disburses cash is subject to regulation as a "branch" only if it is "established (*i.e.*, owned or rented) by a national bank . . . ." This statutory interpretation was also set forth in a series of interpretive letters in which the Comptroller advised that the use of such facilities by national banks on a transaction fee basis does not constitute "branch banking."[3] Based on these interpretations, Marine and other national banks did not obtain "branch" approval from the Comptroller,[4] nor did they consider themselves subject to "branch" capital requirements[5] or "branch" location restrictions[6] in authorizing their customers to use Wegmans' machines.

C. Proceedings Below.

Petitioners alleged in their complaint that the Wegmans Electronic Teller in Wegmans' Canandaigua, New York store was, by virtue of its use by Marine customers, a "branch" "established and operated" by

[3] *E.g.*, Office of the Comptroller, Interpretive Letter No. 188 (May 21, 1981), [1981-82 Transfer Binder] Fed. Banking L. Rep (CCH) ¶85,269, at 77,407 ("a national bank which makes regular use of a facility but has no property interest in the facility has not established a branch"); Office of the Comptroller, Interpretive Letter No. 160, *id.*, ¶85,241 ("EFT Services provided by a bank service corporation do not constitute branching by the participating national banks, as defined in 12 U.S.C. §36 or in the relevant case law"); Office of the Comptroller, Interpretive Letter No. 153 (July 7, 1980), *id.*, ¶85,234 ("it appears that utilizing CBCTs on some basis other than ownership or rent, *e.g.*, on a transactional fee basis, would not constitute branch banking").

[4] National banks require the Comptroller's approval to "establish and operate new branches." 12 U.S.C. §36(c).

[5] The National Bank Act incorporates state law "branch" capital requirements and also contains federal capital requirements for national bank "branches." 12 U.S.C. §§36(c), 36(d), 51.

[6] National banks can "establish and operate new branches" only within the states in which they are situated, and their branching powers are "subject to the restrictions as to location imposed by the law of the State on State banks." 12 U.S.C. §36(c).

Marine. Petitioners argued that, by operating such a branch, Marine was violating the New York "home-office protection" statute, N.Y. Banking Law §105 (Pet. 1a-2a), one of the state law restrictions as to branch location incorporated by reference in 12 U.S.C. §36(c). That provision generally prohibits a bank from opening a branch office in a city or village like Canandaigua which has a population of 50,000 or less and in which another bank has its principal office. (Canandaigua is the only "home-office protected" community in which there is a Wegmans Electronic Teller). Petitioners also alleged that Wegmans' provision and maintenance of the Wegmans Electronic Tellers constituted unauthorized banking in violation of N.Y. Banking Law §131(1).[7]

The district court granted petitioners summary judgment on their claim against Marine and enjoined Marine from letting its customers use the Canandaigua Wegmans' ATM. The district court found that Wegmans' ownership and maintenance of its ATMs did not constitute unauthorized banking, and it granted Wegmans summary judgment.

In its decision reported at 757 F.2d 453 (2d Cir. 1985) the Court of Appeals for the Second Circuit reversed the district court's decision on the claim against Marine and granted Marine summary judgment, finding that the Canandaigua Wegmans' ATM was not a "branch" "established and operated" by Marine. The Second Circuit vacated the district court's decision in favor of Wegmans on the state law claim, finding that this claim involved a state law issue of first impression which the district court should have abstained from deciding.

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[7] N.Y. Banking Law §131(1) is set forth in relevant part in the Second Circuit's decision, 757 F.2d at 463 (Pet. 27a).

Summary Of Argument

The issue raised by the Petition—namely, whether a national bank "establishes and operates" a "branch" under the National Bank Act by permitting its customers to obtain cash and initiate deposits at a shared ATM owned and operated by a grocery store—is a question of first impression. There exists no conflicting decision in any other circuit; to the contrary, the Comptroller's regulation, under which the Canandaigua Wegmans' ATM is not Marine's "branch," is itself based on nine-year-old circuit court authority. The Second Circuit's decision is consistent with decisions of this Court construing the McFadden Act, and the Second Circuit's approval of the Comptroller's regulation was based on factors this Court has itself considered in reviewing agency regulations. The decision maintains the *status quo* and has limited effects on competition on both the national and state levels—as well as in Canandaigua itself. Congress continues to monitor this area, and petitioners' efforts to change the law and reverse industry practice should be directed there.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Decision Does Not Conflict With Decisions Of Other Circuits.

Petitioners concede that this is a case of first impression (Pet. 10), and respondent is aware of no other case in which the validity of the Comptroller's regulation or the status under the McFadden Act of ATMs linked to a shared network is at issue.

The Second Circuit's decision in no way conflicts with decisions in other circuits (Pet. 11, n. 4) that have applied the McFadden Act to ATMs. Each of those decisions, including that of the Eighth Circuit in *State Bank of Fargo v. Merchants National Bank and Trust Co.*, 593 F.2d 341 (8th Cir. 1979) (Pet. 28), involved proprietary ATMs deployed, owned and solely used by individual national banks. The issue in each of those cases was whether the ATM in question was a "branch" under 12 U.S.C. §36(f), and the issue here—namely, whether the claimed "branch" was "established and operated" by the bank under 12 U.S.C. §36(c)—was not present.

While the difference in applicable statutory provisions itself distinguishes this case from decisions involving proprietary ATMs, there are also important practical differences between such ATMs and a shared facility operated by an independent entity like Wegmans. When a customer makes a withdrawal at his bank's proprietary ATM he is transacting business directly with the bank, as he would in visiting a "brick and mortar" branch. Obtaining cash from Wegmans' machine is, by contrast, a transaction with Wegmans substantively no different from cashing a check at the store's service desk. A store that cashes checks is not a "branch" bank, nor would the

store become a "branch" if its personnel called the bank to verify identification and available funds before cashing a customer's check. Wegmans, which has long cashed checks in its stores, has simply automated the check-cashing function by verifying the availability of funds electronically, dispensing the money mechanically, and obtaining an immediate credit to its network settlement account instead of waiting for checks to clear. There has been no change in the store's substantive role that would convert it into a "branch" "established and operated" by any bank. The competitive impact of a shared Wegmans Electronic Teller used by Marine and a Marine proprietary ATM or other branch also differ because Marine has no right to limit other financial institutions' access to, or otherwise control the use and deployment of, Wegmans' machines.

The Second Circuit's decision is consistent with and properly applies the D.C. Circuit's decision in *IBAA v. Smith*, in which that court held invalid a 1974 ruling of the Comptroller that would have authorized national banks to establish and operate *their own* ATMs and other customer-bank communication terminals ("CBCTs") without regard to "branch" restrictions. Central to that decision was the court's treatment of the Comptroller's argument that such ATMs are functionally no different from mailboxes, telephones and other facilities that are not "branches" even though they may be used to initiate banking transactions. The court rejected this purely functional approach and instead drew a distinction, for purpose of 12 U.S.C. §36(c), between facilities established by banks and facilities supplied by others that may be used for banking purposes:

> . . . CBCT's enable bank customers to transfer funds between two of their accounts at a place remote from the bank's main premises. Hence, under the rationale of [*First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122 (1969)], these off-premises CBCT's are bank facilities where deposits are received when customers withdraw money from their checking, savings, or credit card accounts and deposit these funds into one of their other accounts. The Comptroller's attempt to analogize these account transfers to banking-by-mail and banking-by-telephone breaks down because, *in the case of a mailbox or telephone, no place or facility established (i.e., owned or rented) by a bank is involved.* Mailboxes and telephones are not facilities supplied by banks for the added convenience of their customers and designed to retain and attract patronage.

534 F.2d at 941 (footnote omitted) (emphasis supplied). Later in its decision the court stated:

> Although neither the Comptroller nor the two district courts favoring his position have so argued, they might contend that it is difficult to distinguish between a CBCT that cashes a customer's overdraft check (written on an open-end account) and a grocery store or other retail establishment that cashes the same check. If a CBCT becomes a branch bank simply because it provides this service, on first blush one might conclude that grocery stores performing the same function also are engaged in branch banking. This conclusion, however, would be incorrect because *a bank does not establish a grocery store as a place for disbursing overdraft loans (any more than a bank establishes a mailbox or a telephone as a place where its customers can make deposits or communicate account transfers).* To the contrary, the store provides this convenience to its customers for the same reason a bank establishes a CBCT—to retain old and attract new patronage.

534 F.2d at 946-7 n.98 (emphasis supplied). The court's carefully-framed holding followed directly from the above passages:

> . . . any facility that performs the traditional bank functions of receiving or disbursing funds is a "branch" of a national bank within the meaning of section 36(f) *if (1) the facility is established (i.e., owned or rented) by the national bank,* and (2) it offers the bank's customers a convenience that gives the bank a competitive advantage over other banks (national or state) that do not operate similar facilities.

534 F.2d at 951-52 (emphasis supplied).

Far from being the mere "parenthetical" petitioners call it (Pet. 26, 28), the D.C. Circuit's "owned or rented" standard was essential to the holding in *IBAA v. Smith,* in that it signified the court's rejection of a purely functional approach like petitioners' in favor of a more accurate "bright-line" test that reflects economic control and consumer perception, as well as function. Taking note of the industry's reliance on the Comptroller's rulings, the D.C. Circuit stated that "the Comptroller can quickly revise his regulations to conform with the court's decision," 534 F.2d at 930—which is precisely what the Comptroller did.[8] The Second Circuit's decision and the Comptroller's regulation are entirely consistent with *IBAA v. Smith,* and there exists no contrary authority in any other circuit.

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[8] Contrary to petitioners' contention (Pet. 21), there is no conflict of views between the Comptroller and the Federal Reserve Board: the Federal Reserve Board joined in the Comptroller's *amicus* brief to the Second Circuit in support of Marine's position. Nor is there any conflict between the Comptroller's regulation and the Federal Reserve Board's ruling in *Michigan National Corp.,* 64 Fed. Res. Bull. 127 (Feb. 1978). That matter involved an arrangement by which several national banks owned by *a single bank holding company* allowed their customers to bank at each other's main offices and "brick and mortar" branches in violation of state law branching restrictions.

II. The Second Circuit's Decision Does Not Conflict With Any Of This Court's Decisions.

A. The McFadden Act Issue.

There is no inconsistency between the Second Circuit's decision and this Court's decisions in *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122 (1969) and *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). In *Walker Bank* this Court reaffirmed the McFadden Act's command that the Comptroller cannot authorize a national bank to establish a new "branch" in violation of state law applicable to state banks. In *Plant City* the Court held that state law "branch" location restrictions do not apply unless it is first determined as a matter of federal law that the facility at issue is a "branch" "established and operated" by a national bank. 396 U.S. at 133-34. The Court proceeded to hold that the facilities there at issue—a mobile branch operated from a bank-owned armored car and a leased off-premises depository—were "branches" under 12 U.S.C. §36(f). Because the armored car and deposit receptacle were deployed, used and controlled by the single bank whose name they bore, that case did not present the issue here—namely, whether the facilities were "established and operated" by the bank within the meaning of 12 U.S.C. §36(c). Furthermore, the *Plant City* Court's refusal to give effect to the attempted contractual subterfuge in that case[9] has no application here, where the contract between Wegmans and the

[9] The account agreement and deposit slips used at the mobile branch and off-premises depository in *Plant City* provided that no deposit was made until it was physically received at the bank's chartered premises. 396 U.S. at 127. The Court found that these "contracts [had] no significant purpose other than to remove the possibility that the monies received will become 'deposits' . . . until actually delivered to the . . . bank." 396 U.S. at 136.

HarMoney network is not an attempt to disguise "branching," but rather reflects a legitimate allocation of functions between Wegmans, which deployed the ATMs, and the financial institutions whose customers use them. Finally, in concerning itself with the competitive effects of its holding, 757 F.2d at 460-61 (Pet. 20a-21a), the Second Circuit followed the *Plant City* Court's command, 396 U.S. at 134, that the McFadden Act not be given a restrictive meaning that would frustrate congressional intent to protect national banks.

B. Deference To The Comptroller.

The Second Circuit's treatment of the Comptroller's regulation was consistent with this Court's decisions. Far from frustrating congressional policy (Pet. 19), the Comptroller's regulation advances the McFadden Act's purpose. The McFadden Act was intended to protect and strengthen national banks by redressing the competitive disadvantage they had suffered prior to receiving branching authority from Congress. *Plant City, supra*, 396 U.S. at 318-21; *IBAA v. Smith, supra*, 534 F.2d at 930-31. Petitioners' interpretation of the McFadden Act, under which every ATM used by a national bank would be considered its "branch," would preclude national banks from making any interstate use of ATMs,[10] a power that state banks enjoy in some 36 states[11] and which, as the Second Circuit noted, would afford them "a considerable marketing advantage." 757 F.2d at 461 (Pet. 21a). Petitioners' interpretation would disfavor national banks

[10] 12 U.S.C. §36(c) provides that a national bank can "establish and operate" "branches" only in its home state.

[11] This is petitioners' own count. Statement of George W. Hamlin IV, President, CNB and President, Independent Bankers Ass'n of New York State, Inc. (hereafter "Hamlin Statement"), Hearings Before Senate Committee on Banking, Housing, and Urban Affairs, 98th Cong., Second Sess. on S. 2898, "The Banking Convenience Act of 1984" (September 19-20, 1984) (hereafter "Hearings on S. 2898"), p. 101.

on an intrastate basis as well, since it would make national bank ATM use subject to state law "branching" restrictions in all states, even though thirty-four states now exempt state bank ATMs from "branch" treatment.[12]

The Second Circuit did not attribute undue significance to the absence of legislation overruling the Comptroller's interpretation. Silence is a proper indicator of congressional intent where Congress has shown awareness of the issue at hand, particularly where it has legislated in the relevant area without overruling administrative interpretation. *Bob Jones University v. United States,* 461 U.S. 574 (1983); *Haig v. Agee,* 453 U.S. 280, 300 (1981). In 1974 Congress established the National Commission on Electronic Fund Transfers and charged it with investigating and recommending "appropriate administrative action and legislation necessary in connection with the possible development of public and private electronic fund transfer systems . . . ." 12 U.S.C. §2403(a).[13] Following the Commission's 1977 final report, which expressly addressed the McFadden Act's application to CBCTs, Congress enacted three major pieces of banking legislation: the International Banking Act of 1978, which required the President to report to Congress on the applicability of the McFadden Act to "the present financial, banking and economic environment," P.L. 95-369, 44 Stat. 1224; the Electronic Fund Transfer Act, which was intended "to provide a basic framework establishing the rights, liabilities, and

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[12] Hamlin Statement, Hearings on S. 2898, p. 101.

[13] The *IBAA v. Smith* court's rejection of the Comptroller's 1974 ruling was based in large part on its belief that the Comptroller should not have acted until the "new Commission would have an opportunity to evaluate the advantages and disadvantages of EFTS technology and recommend appropriate legislation." 534 F.2d at 951.

responsibilities of participants in electronic fund transfer systems," 15 U.S.C. §1693(b); and the Garn-St Germain Depository Institutions Act, which among other things authorized the promulgation of regulations allowing federal savings and loan associations to deploy ATMs nationwide, 12 U.S.C. §1464(b)(1)(F). On none of these occasions did Congress overturn *IBBA v. Smith* or any of the Comptroller's interpretations.

The Second Circuit also properly considered the industry's reliance on the Comptroller's statutory interpretation. While petitioners state repeatedly that the Comptroller's final regulation was not adopted until 1982, it is undisputed that the Comptroller has consistently adhered to the "owned or rented" test in interpretive rulings dating back to 1976.[14] Since that time, approximately 200 shared ATM networks have gone into operation on a regional or nationwide basis. Some 16,000 ATMs have been installed and connected to these shared networks, and they process approximately 60 million transactions per month.[15] National banks have assisted in the formation of such networks and have let their customers use shared ATMs in reliance on the

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[14] Any suggestion that parties affected by the Comptroller's "owned or rented" standard could not have challenged it until 1982 would be erroneous. In *IBAA v. Smith*, *supra*, 534 F.2d at 926, the D.C. Circuit specifically rejected the argument that the Comptroller's 1974 interpretive ruling was not ripe for review where the district court had found that "the ruling 'represents the definitive position of the Comptroller on this issue.' "

[15] Statement of Mary Pat Cottrell, Electronic Funds Transfer Association, Hearings on S. 2898, p. 142. Most shared ATM networks link machines owned by financial institution members and, in some instances, by merchants "sponsored" into the networks by such members. Wegmans' agreement with the HarMoney network does not involve any such "sponsorship."

Comptroller's repeated statements that the use of such ATMs is not subject to "branching" restrictions. The Second Circuit correctly viewed the industry's substantial reliance interest as strongly favoring the Comptroller's interpretation. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978); *Independent Bankers Ass'n of America v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) (plaintiff association held estopped from challenging Comptroller's twelve-year old interpretive ruling where national banks had "made substantial financial commitments" in reliance thereon).[16]

III. The Second Circuit's Decision Will Not Have The Effects Claimed By Petitioners.

Petitioners' claim that the decision below "produces significant and disturbing results which affect not only the parties to this action, but the entire banking industry" (Pet. 12) is an overstatement in several respects. First, the Second Circuit's decision effects no change in what has been the industry's understanding of the law since 1976. By upholding the Comptroller's regulation the Second Circuit maintained the legal and competitive *status quo*. By contrast, a contrary decision below, particularly one calling into question the ability of national banks to let their customers use shared ATMs across state lines, would have disrupted systems which have been developed over a nine-year period at a cost of tens of millions of dollars and on which consumers have come to rely.

Second, the Second Circuit's decision does not create significant disparities between the powers of national and state banks on a national basis. As mentioned above, thirty-four states exempt state bank-used ATMs

[16] For the same reasons the Second Circuit was correct in adopting the Comptroller's "owned or rented" test, it was also correct in deferring to the Comptroller's view that "transaction fees" like those paid to Wegmans by the HarMoney network do not constitute "rent." 757 F.2d at 463 (Pet. 25a-26a).

from "branch" treatment, and only eight states classify them as "branches."[17] The state law "branch" restrictions to which petitioners seek to have national bank-used ATMs made subject remain in place in only a small number of states, the number of which will probably decrease further as more states adopt statutes specifically regulating ATMs.

Third, the Second Circuit's decision does not destroy a local monopoly previously enjoyed by CNB and other "protected" banks; such banks' local monopolies have never extended to the ATM field.[18] Federal savings and loan associations, savings banks and credit unions may deploy and use ATMs without regard to state law restrictions applicable to ATMs or "branches," 12 U.S.C. §1464(b)(1)(F); 12 C.F.R. §§545.4-2, 723; and non-bank financial service companies like those formed by Sears, Roebuck & Co. and other national retailers are largely unregulated in their deployment of ATMs and similar facilities.[19] In any event, the erosion of CNB's local monopoly is the unavoidable result of technological change, which continues to give birth to new payment/debit system technologies that are not subject to "branch" restrictions.

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[17] Hamlin Statement, Hearings on S. 2898, p. 101.

[18] Such an extension should in any event be disfavored in view of this Court's criticism of "home office protection"—type statutes as being designed "to make the potential bank customers of suburban, small town and rural areas a captive market for small unit banks." *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 118 (1975).

[19] Non-financial institutions are subject to unauthorized banking statutes like N.Y. Banking Law §131(1), which make the ability of a chain like "7-11" to participate in an arrangement like that posited at Pet. 15 a matter of state law. (Respondent also understands that, unlike that example, the major shared ATM networks do not accept deposits across state lines).

Fourth, the Second Circuit's decision does not create "a §36(c) loophole" (Pet. 15 n. 11). A case in which a national bank tried to evade "branch" restrictions through sham third-party ownership of its ATMs would be very different from this one, where Wegmans had legitimate business reasons to develop its own ATM system, where Wegmans initiated its relationship with the HarMoney network, where each bank's use of Wegmans' machines is nonexclusive, and where Wegmans has significant responsibilities with respect to its ATMs. Subterfuge can be policed against on a case-by-case basis, as the Comptroller has done by stating that a bank becomes a "sponsor" of another's CBCT, thereby subjecting it to regulation as the sponsor's "branch," where it shares in the profits generated by the facility, stations personnel nearby, and prominently associates its name with it.[20]

Finally, petitioners fail to mention that a resolution of the McFadden Act issue in their favor would have limited effect in Canandaigua itself. In an opinion letter received by Marine before its customers began using the Canandaigua Wegmans ATM, the New York Banking Department advised that the use of a shared ATM to make withdrawals and credit card cash advances did not constitute "branch banking" under New York law.[21] While this case was on appeal to the Second Circuit, the New York Legislature amended the Banking Law, effective October 8, 1984, to provide that ATMs and similar facilities "shall not be deemed to be branches" except for purposes of the "home office protection"

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[20] Office of the Comptroller, Interpretive Letter No. 188, *supra*.

[21] This opinion letter was referred to in the district court's decision, 583 F. Supp. 1042, 1048 (W.D.N.Y. 1984) (Pet. 44a-45a).

statute. N.Y. Banking Law §105-a (Pet. 2a). Although neither the Banking Department nor any court has yet construed the 1984 amendment, respondent believes, based on the prior opinion letter, that the Banking Law as amended would not prevent Marine from letting its customers use the Canandaigua Wegmans ATM to obtain cash, even if that ATM were deemed a "branch" "established and operated" by Marine under the McFadden Act. *IBAA v. Smith*, *supra*, 534 F.2d at 948 (national bank may use ATM that qualifies as a "branch" to the same extent state banks are permitted to do so).

IV. Petitioners' Arguments Should Be Directed To Congress.

Petitioners' arguments are, at bottom, ones of policy. Petitioners contend that "home office protection" and similar restraints on competition should be extended to new technologies as they develop; others believe that national banks should be free to compete vigorously with state banks, thrifts and non-financial institutions in emerging fields. Petitioners contend that state and national banks must remain on an equal footing in the eight states that treat ATMs as "branches"; others believe that enabling national banks to compete effectively on a national scale—and particularly in the much greater number of states that do not restrict ATMs as "branches"—is a more important concern. Petitioners contend that increased ATM deployment will increase concentration in the banking industry and erode the deposit bases of "community-based independent banks" (Pet. 16); other small banks view shared ATM networks

and similar technologies an opening an area in which they can compete as equals with much larger banks.[22]

If petitioners believe that technological change has opened an undesirable "loophole" in the fifty year-old McFadden Act, they should, as the Second Circuit advised, 757 F.2d at 462 (Pet. 25a), direct their arguments to Congress. Congress continues to monitor this area closely. Hearings were held in the last session of Congress on the proposed "Banking Convenience Act of 1984" (S. 2898, 98th Cong., 2d Sess.), which would have codified the Comptroller's "owned or rented" standard.[23] Oversight hearings have been held by the Senate Banking Committee this session, and there are now pending in Congress the proposed "Banking Convenience Act of 1985" (S. 206, H.R. 688, 99th Cong., 1st Sess.), which is substantially identical to the prior bill, as well as the proposed "Automatic Teller Machine Competitive Equality Act of 1985" (H.R. 2099, 99th Cong., 1st Sess.) and the proposed "Electronic Banking Competitive Equality Act of 1985" (S. 1148, 99th Cong., 1st Sess.), both of which would make national banks subject to state laws and regulations applicable to ATMs. Petitioners' efforts to change the law and reverse the *status quo* should properly be directed toward passage of one of the latter two bills or other legislation they consider appropriate.

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[22] By way of example, two members of the plaintiff association have been members of the HarMoney network. These banks lack the assets and customer bases to compete with Marine and other large financial institutions in terms of "brick and mortar" branching, but they are able to extend to their customers the same service and convenience as customers of larger institutions enjoy by letting them use shared ATMs.

[23] The Hearings on S. 2898 are referred to in several of the footnotes, *supra*.

Conclusion

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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